

**Mediation Training & Consultation Institute**  
**330 E. Liberty, Suite 3A Ann Arbor, MI 48104**  
**(734) 663-1155/ Fax: (734) 663-9524**

Email: [zzumeta@igc.org](mailto:zzumeta@igc.org) Web: [www.learn2mediate.com](http://www.learn2mediate.com)

October 27, 2002

Clerk of the Court  
Supreme Court of Michigan  
P. O. Box 30052  
Lansing, MI 48909

[MSC\\_clerk@jud.state.mi.us](mailto:MSC_clerk@jud.state.mi.us)

Re: Proposed Amendments of Rules 2.401 and 2.410 of the Michigan Court Rules

I am writing to strongly urge that the Michigan Supreme Court reconsider its position regarding the proposed amendments to the ADR rules that require *participation in good faith* in the mediation process. The requirement and enforcement of good faith participation would have a chilling affect upon the confidentiality of the mediation process which was guaranteed by the rule. In order to enforce the good faith requirement, a party or a mediator may be required to disclose statements made during the course of settlement discussions which were intended to be confidential.

In addition the requirement of *good faith participation* is inconsistent with a party's right of self-determination, a fundamental principle underlying the mediation process. A party has the exclusive right to decide whether or not to negotiate a settlement of a claim, no matter how unreasonable the exercise of that right might appear. The principle of self-determination is compromised if the amendment imposes upon a party the obligation to negotiate in good faith.

It is especially difficult to determine in domestic relations cases whether parties are negotiating in good faith. There are many reasons and layers of reasons for a party to take a particular position, even if it does not seem reasonable to a mediator or a court. Often the true reason for that position may never come out, and a requirement to negotiate in good faith would only serve to punish someone who is guarding family secrets in order to protect children or even the other spouse. It is very difficult to decide if this is a good reason or not even if the information were to come out.

Another 25% settle shortly thereafter. The vast majority settle before trial. In fact, an article in the American Bar Journal denotes "The Vanishing Trial" due to all of the case management and ADR methods now available to courts and parties. It does not seem to be worth the destruction to the mediation process to get a few more people to settle sooner.

Finally, the Supreme Court appointed a Task Force, which issued its report in January of 1999, and its addendum report in January 2000. The Task Force did consider but did not include a requirement of good faith participation for the reasons stated above. If the rules were not working as intended, we would urge the Court, before adopting these proposed amendments, to reconvene the Task Force so that it could address this issue and make its recommendations to the Court.

Thank you for your consideration.

Very truly yours,

a

D. Zumeta, J.D.